No. 87-2048

IN THE

Supreme Court of the United States

October Term, 1987

TEXACO INC.,
Petitioner,

v.

RICKY HASBROUCK,
d/b/a RICK'S TEXACO, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Texaco's petition asks the Court to consider arguments which Texaco did not raise in the courts below, and frames questions for review which are argumentative and not reflective of the facts presented at trial. Stated without argument, Texaco's petition raises the following questions for review:[1]

1. May a violation of the Robinson-Patman Act be found where a manufacturer sells at one price to retailers and at a lower price to customers it labels "distributors," where the recipients of the lower "distributor" price do not in fact perform distributor functions and either resell at retail in competition with the retailers charged a higher price, or pass the lower price on to retail customers who compete with the retailers charged a higher price?

2. Is the "competitive effect" element of the Act satisfied where there was a substantial long-standing discrimination in price between Plaintiffs and the favored buyers, and direct evidence that Plaintiffs and others similarly situated lost sales because of the discrimination?

3. In awarding damages for a violation of the Robinson-Patman Act, may the jury consider evidence of what prices the favored and disfavored buyer would have been charged in the absence of the violation, or must the jury assume that, absent the discrimination, the supplier would have charged the favored buyer a higher price?

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[1] Respondents do not agree that these issues have been properly preserved by Texaco. See Argument, *infra*.

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STATEMENT OF THE CASE

Texaco's petition distorts, and in many respects ignores the facts which formed the basis for the jury's finding that Texaco violated the Robinson-Patman Act. A complete statement of the facts follows. These facts clearly demonstrate that Texaco violated the Act and caused substantial injury to Plaintiffs.[2] The opinions of the district court and court of appeals do not punish Texaco for charging uniform wholesale prices to distributors, or force Texaco to discriminate in price among its wholesalers. Rather, the jury's verdict and the opinions of the courts below honor the Act's goal of uniform pricing treatment for all competitors, and apply principles which this Court has repeatedly reaffirmed. The lower court opinions recognize that Texaco's argument would make supplier labels rather than economic substance determinative of Robinson-Patman compliance.

[2] For ease of reference, Respondents are referred to herein as "Plaintiffs."

A. Prior Proceedings.

Plaintiffs were Texaco retail service station dealers in Spokane, Washington who purchased gasoline from Texaco and resold it at retail under the Texaco trademark. From 1972-1981 Texaco sold identical gasoline at substantially lower prices to John Dompier Oil Company ("Dompier") and Gull Oil Company ("Gull"), each of which supplied and operated a chain of retail stations in Spokane. (ER 10, CR 669)[3] Plaintiffs brought suit in 1976 alleging that this price difference violated the Robinson-Patman Act. Texaco raised the two statutory affirmative defenses of "meeting competition" and "cost-justification,"[4] and contested virtually every element of Plaintiffs' case. Texaco argued that Plaintiffs did not compete with the Dompier and Gull stations; that its discounts were "functional discounts" which did not affect competition because Dompier and Gull were "wholesalers"; and that Plaintiffs were injured by factors other than Texaco's price discrimination. During a three-week trial, Plaintiffs presented substantial evidence that Texaco's price discrimination substantially affected competition and caused Plaintiffs to lose sales and profits. The jury returned verdicts for Plaintiffs totaling $449,900.

This was the second jury verdict for Plaintiffs in this case, which has now been pending for well over 12 years. In August 1979, following a four-week trial, a jury returned verdicts for Plaintiffs totaling $849,484. However, following the trial the district court held that its jury instruction based on *Fowler*

[3] References to "ER" and "SER" are to the Excerpts of the Record and the Supplemental Excerpts of the Record in the Court of Appeals; references to "RT" are to the reporter's transcript; references to "Exs." are to trial exhibits; references to "CR" are to the district court Clerk's Record in the court of appeals; references to "App." are to the Appendices to this brief.

[4] Texaco abandoned the cost-justification defense at trial. (SER 37)

Mfg. Co. v. Gorlick, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970), had been erroneous and granted judgment n.o.v. for Texaco.[5] On appeal, the Ninth Circuit held that the district court's instruction based on *Fowler* had been proper, and remanded for a second trial with instructions based on this Court's decision in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981), which was decided during the pendency of the appeal. *Hasbrouck v. Texaco, Inc.*, 663 F.2d 930 (9th Cir. 1981), *cert. denied*, 459 U.S. 828 (1982).

By its verdicts, the jury rejected Texaco's defenses, and found that Texaco had engaged in unlawful price discrimination which caused injury to Plaintiffs. The district court denied Texaco's motion for judgment n.o.v. or a new trial, holding, *inter alia*, that even without viewing the evidence most favorably to Plaintiffs, the preponderance of the evidence showed that Texaco's price discounts to Dompier and Gull were not lawful "wholesale" or "functional" discounts which merely offset costs incurred by Dompier and Gull in performing distribution functions for Texaco, and that there was substantial evidence of injury to competition and of antitrust injury to Plaintiffs, including direct evidence of diverted sales. *Hasbrouck v. Texaco, Inc.*, 634 F. Supp. 34 (E.D. Wash. 1985), *aff'd*, 830 F.2d 1513 (9th Cir. 1987), *modified and aff'd*, 842 F.2d 1034 (9th Cir. 1988). The Ninth Circuit affirmed, finding that there was substantial evidence to support the jury's finding of liability and award of damages, and that the district court had properly instructed the jury. *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034 (9th Cir. 1988).

[5] *Fowler* held that injury could be inferred from the fact of unlawful price discrimination, entitling the plaintiff to recover damages of at least the amount of the discrimination.

B. Facts Relevant to the Issues Presented for Review.

1. Texaco's Price Discounts to Dompier and Gull.

Texaco charged Plaintiffs a "Retailer Tank Wagon" ("RTW") price, but gave Dompier and Gull substantial discounts off the RTW price because they bought under "distributor" contracts. (ER 31-34; RT 793-94, 1382-83; Exs. 71, 79, 80-83) Texaco gave Dompier, a "branded" distributor, a discount of 3.65¢ - 3.95¢ per gallon prior to 1977, and 2.65¢ thereafter. (ER 33; Exs. 80-83, 791; RT 791-94) In addition, Texaco paid Dompier a "hauling allowance" which compensated Dompier for the cost of transporting gasoline from the pipeline terminal to the stations it supplied. (ER 33; RT 1148-51; Exs. 463, 788) Texaco gave Gull a discount of 4¢- 6¢ off the RTW price. (ER 34; Exs. 79, 378, 380-82, 762, 463)

"Distributors" were supposed to resell at wholesale to commercial accounts and to retail accounts which were too small for Texaco to deliver directly. Their price discount was intended to compensate them for performing this function. (RT 756, 1386-87; Exs. 1, 202 at 35-37) Although Texaco gave Dompier and Gull the label of "distributor," in fact Dompier and Gull functioned almost entirely as *retailers*, operating retail stations which competed directly with Plaintiffs. (ER 32-35; RT 777, 779, 791, 1425-26)

Gull owned a chain of retail stations which marketed under the "Gull" brand (ER 30; RT 685-86), and resold most of its gasoline through its own stations. (ER 35; RT 686-92; Ex. 385) There were as many as 15 Gull stations in the Spokane area during the period covered by the lawsuit. (ER 35; RT 691; Ex. 385) Similarly, in the early 1970's Dompier changed the nature of its business and began to concentrate its sales in high volume retail outlets rather than the small, rural stations which distributors were supposed to supply. (RT 1425-26; Exs. 14, 97) Initially Dompier supplied these high volume retail outlets,

including two stations owned and operated by a corporation affiliated with Dompier,[6] at sizable discounts off the RTW price.[7] However, in mid-1974 Dompier began to take over these stations and operate them directly. (RT 758-59; Exs. 557, 26) By 1978, Dompier owned and was operating six Texaco retail stations and supplied two others owned and operated by the affiliated corporation. Retailing became 85-90% of Dompier's gasoline business. (RT 757) The evidence showed that Texaco encouraged Dompier to expand into retailing and to purchase stations even if it was necessary to pay premium prices for them. (RT 757-58, 848-49; Exs. 11, 12)

When operating retail stations Dompier and Gull performed no functions which Plaintiffs did not also perform. (RT 1091-1109, 3326; Ex. 910; ER 89) Dompier's president acknowledged that Dompier needed no wholesale salesman to "sell" gasoline to itself, had no wholesale credit risks in "selling" to itself, and had no inventory or administrative expenses different from those of Plaintiffs. (RT 1091-1109; Ex. 910) The one "wholesale" function which Dompier did perform was the function of delivering gasoline in bulk to the stations. However, this function is irrelevant to Texaco's "functional discount" argument because Texaco paid Dompier a hauling allowance which fully compensated Dompier for

[6] The corporation, Red Carpet Car Wash, Inc., had the same address as Dompier and common officers and directors (RT 760-62, 797, 1110-14; Exs. 470, 562), and John K. Dompier wholly owned both John Dompier Oil Co. and Red Carpet Car until 1973 when he retired and his son began purchasing his interest in Dompier on a long-term contract. (RT 1110-14; Exs. 470,562)

[7] In 1972 and 1973, Dompier supplied six stations at prices 2.65¢ - 3.4¢ below the RTW price. This included the two "Red Carpet" stations. *See* note 6. (RT 780-810, 2903-06; Exs. 471, 791, 788, 789, 792, 800, 804) Dompier continued supplying these stations at discounts below the RTW price until approximately January 1974. (*Id.*; RT 789-819; Exs. 471, 800, 804)

this function.[8] (RT 1148; Ex. 1) A Texaco vice president acknowledged that distributors were supposed to resell gasoline at wholesale rather than retail (RT 1386-87), but Texaco had no guidelines to determine whether a purchaser receiving a discount was in fact functioning as a distributor. (RT 1386-87) Texaco continued granting the discount even though it knew Dompier was reselling at retail and passing the discount on to stations it supplied. (RT 1626-34, 2903-08; Exs. 1, 202) In 1976 Texaco questioned whether Dompier was performing wholesale functions but renewed its distributor contract anyway. (RT 1087-89; Ex. 41) In short, the evidence clearly showed that Texaco's granting of price discounts was not based on the functions the buyer performed, but merely on the label Texaco assigned to the buyer.

Although prior to mid-1974 Dompier did engage in some reselling at wholesale, even during this brief period Dompier passed all or most of its discount through to the retail stations it supplied, selling to them at prices well below the RTW price paid by Plaintiffs.[9] (RT 808-09; Exs. 471, 729, 791, 800) Dompier could pass on the discount because it was not performing the functions for which the wholesale discount was intended. For example, Dompier did not take delivery of Texaco gasoline into its own bulk plant storage and then

[8] Historically Texaco paid distributors a hauling allowance to compensate them for hauling gasoline from the pipeline terminal into *the distributor's bulk storage plant*, from which the distributor redelivered the gasoline in smaller loads to customers whose stations were too small to take large deliveries. (Ex. 1 at 2-3; RT 2072-74) However, Dompier had little or no bulk storage, and typically picked up gasoline at the pipeline terminal and delivered it directly to its retail stations. (RT 769-73, 1092-95; Ex. 788) Texaco's vice president testified that this abused the function of the hauling allowance. (RT 2075) Thus, the hauling allowance fully compensated Dompier for its deliveries (RT 769-73).

[9] *See* note 7, *supra*. Dompier's invoices to its customers during the years 1972-1974 were in evidence. (Ex. 792)

distribute the gasoline in small loads to small retailers — the traditional function of a "distributor." Rather, Dompier supplied large, urban stations by deliveries directly from the pipeline terminal and was paid a hauling allowance which covered all its costs.[10] The stations Dompier supplied used their lower buying price to sell at lower retail prices and divert sales from the Plaintiffs. See App. A. For example, when Dompier began supplying one large retail station in 1971, that station was able to post a retail price which was only $^{3}/_{10}$¢ above the buying price of a station operated by a Plaintiff a few blocks away. (RT 493)

Texaco's management recognized that Dompier and other distributors were not performing the distribution function for which the discount was intended, and were utilizing their price discount and hauling allowance to post lower retail prices. (RT 756-57, 2903-04; Exs. 1, 202 at 35-37, 215 at 3) Texaco's vice president stated:

> For many years, we have sold gasoline to distributors at a discount of approximately 3½¢ per gallon from the price charged our independent retailers. This discount was traditionally justified by the many important services distributors performed when they physically "distributed" this gasoline among many customers, most of whom required small volume deliveries. These traditional functions continue to be performed by most of our distributors operating in rural areas, who serve various farm and other small volume accounts including service stations . . . On the other hand, urban distributors have significantly changed their methods of operation over the past few years, particularly since the advent of the gasoline shortage several years ago. *These distributors are shedding many of their traditional functions and have concentrated their sales in very high volume outlets. This has reduced their per gallon overhead cost to the point where a good*

[10] *See* note 8, *supra*.

> *portion of the discount is not being utilized to defray their costs of distribution at all.*
>
> *In addition to this traditional discount, many of these distributors have been obtaining added savings through the manipulation of their hauling allowance... This amount can provide a significant marketing advantage to a distributor when he is not, in fact, incurring the cost of hauling the gasoline to his bulk facility.*

(Ex. 1 at 2-3, emphasis added)[11]

Texaco knew that Dompier was not using the discount to compensate for wholesale functions, even when Dompier resold at wholesale. A Texaco sales representative testified that Texaco's Spokane management acknowledged Dompier was passing on the discount (RT 1631-32, 2903-08), and that he received constant complaints from Plaintiffs about the prices of the Dompier stations (RT 1632-33). Other evidence also established Texaco's knowledge. (Exs. 1, 202) Texaco's sales department observed that "some wholesalers are selling retailers at significant discounts... often taking the hauling allowance and little more as their wholesale profit." (Exs. 1, 202 at 36).

2. *Evidence of Injury Causally Related to Price Discrimination.*

Texaco's price discrimination directly affected competition and diverted sales from Plaintiffs to the Dompier and Gull stations. (App. A)[12] The retail gasoline market in Spokane was characterized by strong competition and low profit margins. (RT 799, 824, 1114-16, 1124-25, 704-09) A station's retail

[11] Exhibit 1 is set forth in full as Appendix B. Bracketed portions of the exhibit were not admitted at trial. *See* Note 15.

[12] Appendix A summarizes in detail the evidence of injury to competition and to Plaintiffs as a result of the price discrimination.

gasoline price was a very important factor in its success (RT 705, 838, 1391-95, 1114-16, 1124-25, 1403), and affected other aspects of a retail dealer's business. (RT 254, 1768-70, 1500-02; Ex. 201 at 8-1, 8-2) The Dompier and Gull stations were for the most part located close to Plaintiffs' stations, on or near the same traffic arterials. (Ex. 385) Because of its relatively small geographic size and the pattern of its streets, Spokane has substantial cross-city traffic, and there was effective competition among stations over relatively broad areas. (RT 498, 1715-21, 2908-09, 1824, 1918-19) Gull's vice president testified that gasoline prices tended to move city-wide due to Spokane motorists' high degree of mobility. (RT 703-04) All the Dompier stations were "Texaco" stations which displayed the same Texaco sign and colors, used the same Texaco promotional devices, and honored the same Texaco credit card as Plaintiffs. (ER 34-35; RT 1425-26, 1096-98)

Dompier and Gull used their price advantage to sell gasoline at retail prices several cents lower than Plaintiffs. (RT 708) A Gull executive characterized the Dompier stations as aggressive marketers which priced below their competition. (RT 704-05) They could do this because of the price discount they received; Dompier's president testified that if Texaco had discontinued his price discount he would have had to increase his stations' retail prices. (RT 853-54)

Many Spokane residents testified that they discontinued purchases from Plaintiffs because Dompier and Gull had lower prices. (App. A) Several Plaintiffs could identify specific customers lost to Dompier and Gull because they observed the customers in the Dompier and Gull stations, saw Dompier and Gull credit card invoices in customers' automobiles when servicing them, or had discussions with disgruntled former customers who complained that Plaintiffs' prices were higher than the Dompier station prices. (RT 238, 243, 315, 401, 530, 600-01, 657-58, 1558, 1244-45, 1290; App. A)

The results of this competitive situation were dramatic. Between 1970 and 1975, Dompier's monthly sales volume almost tripled (from 155,152 gallons to 462,956 gallons), while Texaco's monthly "throughput" gallonage in Spokane (*i.e.*, gallonage sold to Texaco dealers such as Plaintiffs) fell from 569,269 gallons to 389,557. (Ex. 215; RT 1090) Whereas in 1970 Dompier accounted for only 20.7% of the Spokane retail volume, only four years later its share had grown to almost 50%. (Ex. 215 at 2) The share of independent retailers, however, declined from 76% to 42% (*id.*), and Plaintiffs' sales either declined or showed little or no growth. (Exs. 709-21, 127, 128, 33, 39, 374, 645, 648-57) Eight Dompier stations were outselling 19 independent dealers. (RT 1477; Ex. 215 at 2) From 1975 to 1978, Dompier's annual sales increased an additional 1,200,000 gallons (RT 767; Exs. 82-83), whereas by 1978 seven of the thirteen plaintiff stations had closed. (Exs. 709-21; App. A) Similar growth occurred with the Gull stations.[13]

Numerous exhibits and witnesses confirmed that it was Texaco's price discrimination which caused these effects. Several witnesses, including a Gull executive and Dompier's president, testified that a competitor with a lower buying price necessarily had a competitive advantage (RT 838-48, 853-54), and that a price difference of one or two cents would cause substantial shifts in sales. (RT 704-09, 1115-24) Mr. Dompier testified that a Plaintiff who tried to match his retail price would be forced out of business because the Plaintiff had to pay Texaco a higher price for his gasoline.[14]

[13] Between 1973 and 1976 (the years for which complete Gull volume data was available), Gull's retail volume through its five major stations increased 87%. (Exs. 762-64, 769)

[14] As an example, Mr. Dompier testified that in November 1975 he made $7,567.82 in gross profit at one of his stations, but that a Plaintiff selling at the same retail price would have made a gross profit of only $1,139.24. He concluded that a Plaintiff who tried to meet his retail price "would probably go out of the gasoline business." (RT 840-48; Ex. 588)

Texaco's marketing department acknowledged that even if independent retailers converted to self-service they could not compete with distributor stations because of their higher buying price. (Ex. 202 at 36) Texaco's corporate vice president admitted that Texaco's policy of giving discounts and hauling allowances to distributors who were not performing distributor functions had caused a dramatic increase in distributor sales and "an equally dramatic decrease" in sales by independent retailers. (Ex. 1 at 1) He concluded that "a good portion of the [distributor] discount is not being utilized to defray their costs of distribution at all" (*id.* at 2), and that the size of the distributor discount was the cause of the independent retailers' losses:

> We believe that the dramatic shift in gasoline sales from the independent retailer class of purchaser to the independent distributor class of purchaser can be explained almost entirely by the magnitude of the distributor discount and the hauling allowance. We believe that they are inconsistent with the realities of gasoline marketing today.

(Ex. 1 at 3) Similarly, Texaco's marketing vice president acknowledged that the distributor discount had caused "rampant and alarming" increases in distributor sales and dramatic shifts in volume away from independent dealers. (RT 1413-14; Ex. 2) He admitted that the distributor discount was the "root cause" of the independent dealers' losses. (RT 1415-16)

Texaco's Spokane personnel drew the identical conclusion about the effects of its price discrimination in Spokane. A Texaco sales representative stated that Dompier had "a retail marketing advantage over our present contract retailers and investment retailers with which they cannot compete." (Ex. 215 at 3) Another Texaco sales representative testified that the Dompier stations were Plaintiffs' principal competition, and that Plaintiffs could not compete with those stations due

to Dompier's buying discount. (RT 1626, 1636-37, 2903-08) In fact, it was Texaco's Spokane management who best summarized the effects of Texaco's pricing policy in Spokane. They called Texaco's price discrimination a "two-headed snake," and believed that Texaco would have to decide on one method of pricing or the other because the two were in conflict. (RT 1632-34)

3. Plaintiffs' Damages Evidence.

In *J. Truett Payne*, this Court held that a plaintiff injured by a violation of the Robinson-Patman Act may recover the sales and profits he would have gained had there been no discrimination. 451 U.S. at 566-67. To estimate their damages, Plaintiffs presented the testimony of Dr. Keith Leffler, an economist in the University of Washington's Department of Economics. Dr. Leffler studied the Spokane market, the testimony and relevant data, including data on the sales volumes and prices of the Plaintiff, Dompier and Gull stations. He concluded that Texaco's price discrimination had injured Plaintiffs and estimated the sales and profits Plaintiffs would have made absent the discrimination. (RT 1746-47) He did not do this, as Texaco suggests, merely by mechanically assuming that Plaintiffs should have had a lower price.

Texaco could have eliminated the discrimination either by raising the Dompier price, by lowering Plaintiffs' price, or by a combination of the two. There was evidence supporting each of the three possibilities.[15] Therefore Dr. Leffler considered

[15] For example, Texaco considered reducing the price it charged independent retailers such as Plaintiffs (Ex. 1 at 4; Ex. 202 at 35-40). In 1976 Texaco reduced the Dompier discount by one cent. (ER 33) Texaco also considered reducing Plaintiffs' price somewhat and increasing the distributor price somewhat, and considered raising the distributor price without a corresponding raise of the independent retailers' price. (Ex. 202 at 35-40) *See also*

(footnote continued on next page)

what Plaintiffs' and Dompier's buying prices would have been if the discrimination had been eliminated in each of the three ways. (RT 1736-38) He also considered how Dompier and Plaintiffs would have priced at retail if the discrimination had been eliminated, since Plaintiffs' sales volumes were affected by the level of Dompier's and Plaintiffs' retail prices. (RT 1738-40, 1770)[16]

Using a statistical regression analysis, Dr. Leffler determined the actual, observed effects of changes in the retail prices of the Dompier and Plaintiff stations on Plaintiffs' sales. From this he estimated the sales and profits which Plaintiffs would have gained in the absence of Texaco's price discrimination. He did not limit himself to the artificial assumption (urged by Texaco) that Texaco would have eliminated the discrimination only by raising Dompier's price by the full amount of the discrimination. Rather, consistent with this Court's admonition in *J. Truett Payne* that damages are to estimate "what plaintiff's situation would have been in the absence of defendant's antitrust violation," 451 U.S. at 566,

Ex. 1 at 4 (unexcised version contained in App. B) The bracketed portions of Exhibit 1 were excised because they related to Texaco's defense — which the district court and court of appeals rejected — that federal regulations immunized its pricing practices. However, the unexcised exhibit was properly considered by Dr. Leffler in arriving at his expert opinion concerning how Texaco most likely would have eliminated the discrimination. Fed. R. Evid. 703.

[16] Mr. Dompier testified that if Texaco had increased his price, he would have increased his retail price. (RT 853-54) Plaintiffs testified that if Texaco had reduced their price they would have lowered their retail prices by all or a part of the reduction, thus selling more gasoline at the same or greater profit margin. Dr. Leffler gave his economic opinion as to which reaction would have been most likely, but performed alternate damage calculations based upon the various possible reactions, since how Dompier and Plaintiffs would have reacted was a fact question for the jury. (RT 1764-67)

Dr. Leffler estimated damages by taking into account the three possible ways Texaco could have eliminated the discrimination and the ways Dompier and Plaintiffs would have reacted to the elimination of the discrimination. (RT 1749-73; Exs. 913-18)

The determination of what would have occurred absent the discrimination was an inherently factual question for the jury. The resulting damages awards were very conservative; the combined verdicts represent an average award of only $5,486.59 per year for each Plaintiff, representing only a few additional customers per day.[17] (RT 2928-32; Ex. 932)

SUMMARY OF ARGUMENT

The district court and court of appeals opinions do not conflict with the decision of any other circuit court or of this Court. The trial record clearly established that, despite their "distributor" classification, Dompier and Gull in fact functioned as retailers in competition with Plaintiffs, and that even during the brief period when Dompier resold at wholesale the discount was passed on with Texaco's knowledge to Dompier-supplied retailers who competed with Plaintiffs. The courts below properly applied the decisions of this Court which hold that price discrimination which has a reasonable possibility of lessening competition violates the Robinson-Patman Act irrespective of the level in the distribution chain at which the competitive effect occurs, and irrespective of the formal label a supplier uses for its customer.

Economic substance, not suppliers' labels, determines Robinson-Patman compliance. Texaco would have the Court disregard economic substance and permit suppliers to violate the Act simply by assigning favorable "functional" labels to

[17] Plaintiffs operated 13 stations during the damage period which were open for an average of 6½ years per station.

preferred customers or by adding levels to the distribution chain. Similarly, Texaco would elevate fiction over fact by forcing the jury to award damages based solely on an artificial assumption unrelated to what the Plaintiffs' situation actually would have been absent the violation. No opinion of this Court or any other court supports such a result.

ARGUMENT

I. The Price Differential Was Not A Lawful Functional Discount.

Texaco argues that the lower court opinions "conflict with long established legal principles," and require Texaco to unlawfully discriminate among its wholesalers on the basis of wholesaler costs. There is serious question whether Texaco has properly preserved this argument.[18] Moreover, even if it has, the argument finds no support in the Robinson-Patman Act or any decision of this Court interpreting it.

The Robinson-Patman Act's fundamental purpose is to provide competitors equivalent prices so that all will start from the same position. *See F.T.C. v. Sun Oil Co.*, 371 U.S. 505, 520 (1963). The Act prohibits price discriminations that may "substantially lessen competition." Therefore, the existence of a competitive situation is required for a violation. Kintner, *A Robinson-Patman Primer* 152-53 (2d ed. 1979). If the

[18] The argument that the district court's instructions or decision would require Texaco to unlawfully discriminate in price among wholesalers was not presented to the district court or the court of appeals. Texaco simply argued there was insufficient evidence to support the verdict because (Texaco claimed) its price discounts were simply wholesale discounts. *See* ER 101; Brief of Appellant at 12. Thus, the issue as presented to this Court was not properly preserved. *City of Springfield v. Kibbe*, 107 S.Ct. 1114, 1115-16 (1987); *E.E.O.C. v. F.L.R.A.*, 476 U.S. 19, 24 (1986).

recipient of a "wholesale" discount in fact functions as a wholesaler, and does not compete with retailers or others charged a higher price, the difference in prices does not violate the Act since the requisite effect on competition is absent. On the other hand, if the price discrimination causes anticompetitive effects, the Act proscribes it regardless whether the supplier labels the discount a "wholesale" or "distributor" discount. "There is general agreement that the legality of functional price differentials depends on whether they give rise to anticompetitive effects." Monograph, *The Robinson-Patman Act: Policy and Law, Volume 1* 59 (ABA, Section of Antitrust Law 1980).

Texaco asks the Court to disregard the Act's fundamental focus on competitive effect. Texaco would have the Court hold that a supplier may grant discounts to a customer it labels a "distributor" irrespective of whether the "distributor" in fact performs wholesale functions, and irrespective of whether the "distributor" in fact resells at retail in competition with retailers charged higher prices, so long as the supplier charges the same price to all customers the supplier calls "distributors." But this Court has long held that substance, not suppliers' labels, controls Robinson-Patman compliance. For example, in *F.T.C. v. Ruberoid Co.*, 343 U.S. 470 (1952), the Court upheld an order of the Federal Trade Commission prohibiting wholesale discounts to buyers of roofing materials who *in fact* functioned as applicators (retailers):

> . . . [T]here was ample evidence that Ruberoid's classification of its customers did not follow real functional differences. Thus some purchasers which Ruberoid designated as "wholesalers" and to which Ruberoid allowed extra discounts in fact competed with other purchasers as applicators. And the Commission found that some purchasers operated as both wholesalers and applicators. So finding, the Commissioner disregarded these ambiguous labels, which might be used to cloak discriminatory discounts to favored customers, and stated its order in terms of "purchasers who in fact compete." Thus stated, we think the order is understandable, reasonably related to the facts shown by the evidence, and within the broad discretion which the Commission possesses in determining remedies.

343 U.S. at 475.

Thus, in applying the Robinson-Patman Act to functional discounts courts have consistently focused not on labels but on substance — *i.e.*, whether customers of the seller in fact compete and whether the price discrimination may substantially lessen competition. *Ruberoid*, 343 U.S. at 475; *Kirby v. P.R. Mallory & Co.*, 489 F.2d 904, 909 (7th Cir. 1973), *cert. denied*, 417 U.S. 911 (1974) ("[T]he litmus test of a wholesaler is the character of his selling, not his buying"); Monograph, *supra*, at 59; Kintner, *supra* at 152-158.

> Functional pricing difficulties sometimes arise because a complexity of class designations are assigned to customers who really are in competition with one another. The artificial nomenclature solves nothing. The competitive realities govern, not the manufacturer's internal terminology. . . .

Schniderman, *Price Discrimination in Perspective* 37 (ALI/ABA 1977). Where, as in this case, a manufacturer sells to a customer with dual functions (*e.g.*, a customer which resells at wholesale and retail), the manufacturer may provide a wholesale discount only to the extent the customer in fact functions as a wholesaler because "[a] straight distributor discount would give an inordinate advantage over competing retailers. . . ." Kintner, *supra* at 155.

This principle has been applied in the gasoline industry on remarkably similar facts. In the *Standard Oil* litigation, the Act was held to prohibit discounts to "jobbers" who were not required to, and in fact did not resell at wholesale but at

retail, where the effect of the discounts was to injure competition. *Standard Oil Co.*, 41 F.T.C. 263, 272-73 (1945), *modified*, 43 F.T.C. 56 (1946), *modified and aff'd*, 173 F.2d 210 (7th Cir. 1949), *rev'd on other grounds*, 340 U.S. 231 (1951).

Nor is Texaco's argument any more persuasive as applied to the brief period prior to 1974 when Dompier resold gasoline at wholesale. This Court has squarely held that price discrimination may violate the Robinson-Patman Act even if the favored and disfavored buyer do not operate at the same level of the distribution chain. *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969). This simply honors the plain language of the Act, which prohibits price discrimination "where the effect of such discrimination may be . . . to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination *or with customers of either of them* . . . ." 15 U.S.C. § 13(a) (emphasis added). "[T]he competitive injury component of a Robinson-Patman Act violation is not limited to the injury to competition between the favored and the disfavored purchaser; it also encompasses the injury to competition between their customers . . . ." *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 436 (1983). Thus, where a price discrimination results in injury to competition between direct buying retailers and *customers* (or customers of customers) of one who receives a wholesale discount, actionable "third-line" or "fourth-line" injury results. *Perkins*, 395 U.S. at 647-48.[19]

[19] "Third-line" injury results where price discrimination affects competition between the disfavored buyer and customers of the favored buyer. *Boise Cascade Corp.*, [1983-87 FTC Complaints and Orders Transfer Binder] Trade Reg. Rep. (CCH), ¶22,330 at 23,296 (1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988). *See Falls City*, 460 U.S. at 436; *Standard Oil Co. v. F.T.C.*, 173 F.2d 210 (7th Cir. 1949), *rev'd on other grounds*, 340 U.S. 231 (1951); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1040 n.46 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982);

(footnote continued on next page)

Perkins holds that even *fourth*-line injury is actionable when a supplier's wholesale discount is passed on to retailers who use the price advantage to take sales from direct-buying retailers who were charged a higher price:

> Here, Perkins' injuries resulted in part from impaired competition with a customer (Regal) of a customer (Western Hyway) of the favored purchaser (Signal). The Court of Appeals termed these injuries "fourth level" and held that they were not protected by the Robinson-Patman Act. We conclude that *this limitation is wholly an artificial one and is completely unwarranted by the language or purpose of the Act.*
>
> . . . From Perkins' point of view, the competitive harm done him by Standard is no less because of the presence of an additional link in this particular distribution chain from the producer to the retailers. Here, Standard discriminated in price between Perkins and Signal, and there was evidence from which the jury could conclude that Perkins was harmed competitively when Signal's price advantage was passed on to Perkins' retail competitor Regal. These facts are sufficient to give rise to recoverable damages under the Robinson-Patman Act.

395 U.S. at 647-48 (emphasis added). Recent opinions of this Court confirm the continued viability of this fundamental principle. *Falls City*, 460 U.S. at 436; *J. Truett Payne*, 451 U.S. at 562.[20]

See also Kintner, *supra* at 110-12, 164-71 ("Actionable competitive injury may arise at any level in the distribution scheme . . . ."); 5 Von Kalinowski, *Antitrust and Trade Regulation* §§ 31.02-31.03 (1988).

[20] The district court's instruction on actionable third-line injury was directly based on the holding in *Perkins*. However, it went beyond the requirements of *Perkins* since it required the jury to find that Texaco knew that Dompier was passing on the discount to its customers.

The court's instruction did not require Texaco to police the prices charged by its customers in violation of the Sherman Act.

(footnote continued on next page)

The court of appeals decision plainly does not require a supplier to engage in unlawful price discrimination among its "distributor" customers.[21] The court's decision does recognize that suppliers have a responsibility to charge prices based on functions which their customers are in fact performing. The burden this may place on a supplier to ensure that its customers are in fact entitled to price discounts is not only warranted but required by the Robinson-Patman Act. It is not a new burden but one of which suppliers have been aware and under which they have operated without difficulty for many years.[22] To relieve suppliers of the responsibility to price according to their customers' functions would reduce the Act to a nullity.

This case provides a clear example of what the effect of Texaco's argument would be. Although they bought under "distributor" contracts, the evidence was virtually overwhelming that Dompier and Gull competed directly with

as Texaco contends. Texaco was not powerless to prevent a pre-July 1974 violation, but could have altered its price either to the plaintiffs or to Dompier, as it recognized in recommending a change to "rack" pricing (Ex. 202 at 35-37). *See* note 15, *supra*.

[21] This argument, even if otherwise valid, would have no application to the facts of this case and has no support in the record. Texaco distributors were located in separate towns and served separate geographic areas, with different competitive conditions. (RT 2348) There was no evidence in this case of any other Texaco distributor competing with Dompier in the Spokane market. Thus, price differences among "distributor" customers on this record would not affect competition as required by the Act.

[22] For example, the *Standard Oil* litigation dates from the mid-1940's. This Court decided *Ruberoid* and *Perkins* in 1952 and 1969, respectively. The FTC's *Doubleday* and *Mueller* decisions, decided in 1955 and 1962, respectively, made it abundantly clear that the Act applies to functional discounts. *Doubleday & Co.*, 52 F.T.C. 169 (1955); *Mueller Co.*, 60 F.T.C. 120 (1962), *aff'd*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964). *See* note 24, *infra*.

Plaintiffs in retail sales; that when they did resell at wholesale they performed few if any wholesale functions and passed on all or most of their discount to customers who competed directly with Plaintiffs; that sales were diverted from Plaintiffs to the Dompier and Gull stations; and that the Dompier and Gull stations flourished and grew while the Plaintiff stations stagnated and gradually disappeared. To hold that these effects of Texaco's price discrimination should be disregarded would gut the Act's language and intent.

No other courts of appeal have so held. *White Industries, Inc. v. Cessna Aircraft Co.*, 1988-1 Trade Cas. (CCH) ¶67,992 (8th Cir. 1988), cited by Texaco, was a markedly different case which properly holds that true functional discounts with no adverse effect on competition do not violate the Act.[23] *Boise Cascade Corp. v. F.T.C.*, 837 F.2d 1127 (D.C. Cir. 1988), the only other case cited by Texaco, turned on the issue of whether competitive injury had been shown where there was no direct evidence of lost sales. 847 F.2d at 1143, 1146, 1148. Because it remanded the case for further proceedings, the court did not need to decide whether functional discounts should be judged by the Commission's *Mueller* rule or the less restrictive

[23] In *White Industries* a retail dealer sought the same price as a wholesaler so that he could resell to other dealers. There was no evidence that any Cessna distributor had passed a discount on to dealer customers, nor any evidence that the distributors were not in fact performing distribution functions. (p.58,087) Distributors had sold to end users in competition with dealers in only a few instances, and there was no evidence that the plaintiff had lost any sales. (p.58,085) *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019 (2d Cir. 1978), *cert. denied*, 429 U.S. 1097 (1977), also cited by Texaco, did not even involve a sale to two different purchasers at different prices. The Second Circuit simply held that the Plaintiff, which purchased parts not from Ford but from a Ford dealer, had no standing to complain when Ford withdrew a price discount from all its dealers.

Doubleday rule, either of which supports a finding of violation in this case.[24]

II. There Was Ample Evidence Of Injury To Competition

The Robinson-Patman Act requires a plaintiff to establish that the effect of the price differential "may be substantially to lessen competition." In *F.T.C. v. Morton Salt Co.*, 334 U.S. 37 (1948), this Court held that a prima facie showing of this "competitive effect" requirement may be made by proof of a substantial price discrimination between competing purchasers over time. Texaco asserts that if the favored buyer is a "wholesaler" and the disfavored buyer a retailer the *Morton Salt* inference does not apply, and that the district court's instruction based on *Morton Salt* established "what is essentially a *per se* rule of illegality." (Pet. at 13)[25]

[24] 837 F.2d at 1148 n.19. In *Mueller* the FTC held that a violation occurs when a supplier gives a "wholesale" discount to a purchaser who resells at retail and the discount affects competition, without the necessity to inquire into whether the size of the discount is reasonably related to costs incurred by the favored buyer in performing wholesale functions. In *Doubleday*, which *Mueller* overruled, the Commission held that in some circumstances evidence of services performed by the buyer should be considered in determining the legality of a wholesale discount. *Boise Cascade Corp.*, Trade Reg. Rep. (CCH) ¶22,330 at 23,394 (1986).

Both the *Mueller* and *Doubleday* rules recognize that functional discounts can violate the Robinson-Patman Act. Here the evidence supported a violation under either the *Mueller* or *Doubleday* rule. Under the *Doubleday* rule the trier of fact must determine whether the discount was reasonably related to the cost of functions the buyer performed. Here the district court freely permitted Texaco to introduce evidence concerning services allegedly provided by Dompier and Gull, but Texaco made no real effort to quantify such services.

[25] Texaco's argument that the district court should have instructed the jury that the Act required Plaintiffs to prove an *actual* impact

(footnote continued on next page)

Texaco did not object to the district court's jury instruction based on *Morton Salt* (RT 3111, CR 739), and did not challenge the court's *Morton Salt* instruction in the court of appeals. Accordingly, Texaco failed to preserve this issue for review and it is not appropriate for review by the Court. *City of Springfield v. Kibbe*, 107 S.Ct. at 1115-16.

Moreover, the district court's instruction was proper even if Texaco had properly preserved an objection to it. *Morton Salt* recognizes "what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay." 334 U.S. at 46-47. This Court has recognized that the logic of this inference applies not only where the competitive effect is felt at the level of the favored and disfavored buyers, but also where it is felt at the level of their customers. *Falls City*, 460 U.S. at 436. If the disfavored buyer in fact competes with the favored buyer, he suffers the same competitive disadvantage which the court identified in *Morton Salt* irrespective of whether the favored buyer is labeled a wholesaler and the other a retailer. To hold otherwise would honor suppliers' labels at the expense of economic substance.

Boise Cascade Corp. v. F.T.C. does not cast doubt on the application of the *Morton Salt* inference here. To the contrary, the D.C. Circuit expressly found that "[t]he *Morton Salt* inference is . . . alive and well in the law," 837 F.2d at 1139, and confirmed that it "was properly relied upon here to establish a *prima facie* case of competitive injury." *Id.* at 1146 n.16. The court remanded the case to the FTC for further proceedings because there was no evidence that disfavored

upon competition is plainly incorrect. *J. Truett Payne*, 451 U.S. at 561-62; *Falls City*, 460 U.S. at 434-35. Texaco confuses the standard for proof of a violation of the Act with the requirement that a plaintiff prove actual injury by reason of the violation in order to recover damages.

buyers had lost sales to Boise, *id.* at 1135, 1145, and the FTC had not considered evidence which Boise offered to rebut the *Morton Salt* inference of competitive injury. *Id.* at 1144-46. Here, on the other hand, there was substantial direct evidence that Plaintiffs lost sales to Dompier and Gull, and Texaco had ample opportunity to show that competition was not likely to be affected by its price discrimination. The district court instructed the jury that it was not required to infer competitive effect (SER 59; RT 3337), and gave the jury every opportunity to accept Texaco's arguments. (SER 541-44) Texaco's real complaint is that the jury did not find its evidence persuasive. This disappointment with the result of a factual finding is hardly a basis for review by this Court.[26]

III. The Jury Properly Considered Evidence Of What Plaintiffs' Situation Would Have Been Absent The Violation

Texaco argues that a plaintiff may prove damages only by making the artificial assumption that, in the absence of the price discrimination, the supplier would have charged the favored buyer a higher price, and that Plaintiffs' proof of injury and damages was predicated on an improper theory that Plaintiffs had been "overcharged." In fact, Plaintiffs' evidence

[26] For example, Texaco argued that Plaintiffs faced serious competition from other brands of service stations, and that it was this competition, and not Texaco's price discrimination, which affected competition. But the evidence showed that in the face of this allegedly withering competition from others, Dompier and Gull not only survived but flourished, while Plaintiffs had the opposite experience. It is a logical inference that the Dompier and Gull discount was the reason for this difference.

and the district court's instructions scrupulously complied with *J. Pruett Payne*'s requirements.[27]

The Court's focus in *J. Truett Payne* was on whether the plaintiff had presented sufficient evidence of injury to support a damages award. 451 U.S. at 567, n.5. The Court held that proof of a violation of the Act does not alone constitute injury, 451 U.S. at 562, and suggested that Payne was "arguably foreclosed" from establishing injury since the price discount involved was extremely small and there was no evidence that the favored buyer had used the discount to sell cars at lower retail prices. *Id.* at 564 n.4.[28] The Court reiterated that if injury is established, precise proof of damages is not necessary since "[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of defendant's antitrust violation." *Id.* at 566. The Court reaffirmed its holding in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946) that:

> [T]he jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict

[27] This argument again has not been fully preserved. Texaco did not object to the damage instruction given by the district court (RT 3134-36), did not object to the testimony of Plaintiffs' economic expert or Plaintiffs' damage exhibits, and presented no alternative measure of damages. Texaco merely objected to the damages exhibits for "lack of foundation." (RT 1754-56, 1761, 1763, 1773) Texaco thus waived its assertions of error. Fed. R. Evid. 103(a); *Vallejos v. C.E. Glass Co.*, 583 F.2d 507 (10th Cir. 1978). Since Texaco failed to provide an alternate damage theory, it is precluded from arguing that any other theory of damages might have been more reasonable. *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985).

[28] The price discrimination amounted to approximately $11 on the price of a new car, a miniscule amount compared to the discrimination here. *See Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 581 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982).

> accordingly. In some circumstances "juries are allowed to act on probable and inferential as well as upon direct and positive proof." . . Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

327 U.S. at 264-65.

Nowhere does *J. Truett Payne* suggest that a plaintiff may prove damages only by assuming that, in the absence of the price discrimination, the seller would have charged the favored buyer a higher price. Such a rule would be inconsistent with reality, and with the Court's reaffirmation that the jury is to estimate "what plaintiff's situation would have been in the absence of defendant's antitrust violation." 451 U.S. at 566. In accordance with *J. Truett Payne*, Plaintiffs placed before the jury evidence of what their situation would have been absent the price discrimination. This involved an inherently factual determination for the jury of how Texaco would have priced absent the discrimination, and of how Plaintiffs and Dompier would have reacted to the absence of the discrimination. Texaco could have eliminated the discrimination by increasing the Dompier price, reducing the Plaintiffs' price, or by a combination of the two, and there was evidence that Texaco had considered all three alternatives.[29] Plaintiffs provided the jury with an estimate of damages under each of the three alternatives. The determination of the damages based on this evidence was properly left to the jury.

Plaintiffs thus presented the best evidence possible of what Plaintiffs' situation "would have been in the absence of

[29] *See* note 15, *supra*.

[Texaco's] antitrust violation." 451 U.S. at 566. The court of appeals correctly concluded that the damage awards were not based on a theory that Plaintiffs had been "overcharged," but on actual evidence of what Plaintiffs' market situation would have been. 842 F.2d at 1043-44.[30]

This Court recognized in *J. Truett Payne* that where, as here, "the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts." 451 U.S. at 567. Yet Texaco's argument would do exactly that, denying Plaintiffs relief based on an artificial assumption unsupported by the evidence. Plaintiffs clearly proved they were injured by reason of Texaco's pricing, and presented a realistic and reasonable estimate of what their situation would have been absent the violation. That is precisely what *J. Truett Payne* requires.

[30] Both during the trial (RT 1722-24) and in its final instructions (SER 68), the court told the jury they could not award damages merely by reference to the price difference, but could only award damages proximately caused by the price discrimination.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that Texaco's petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

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SUMMARY OF EVIDENCE ON COMPETITION AND INJURY

I. GROWTH OF DOMPIER AT EXPENSE OF PLAINTIFFS.

1. Between 1970 and 1975, Dompier's monthly sales volume almost tripled, whereas during the same period of time Texaco's monthly "throughput" gallonage in Spokane fell from 569,269 gallons to 389,557. (Ex. 215) Where as Dompier accounted for only 20.7% of the Spokane District retail marketing volume in 1970, only four years later its share had grown to almost 50%. (Ex. 215, p.2)

2. The share of directly-supplied retailers like the Plaintiffs declined from 76% to 42% (Ex. 215, p.2), and the Plaintiffs' sales either declined or showed little or no growth (Exs. 709, 721, 645, 657), and eight Dompier stations were outselling 19 independent dealers.

(RT 1477; Ex. 215, p.2) From 1975 to 1978, Dompier's annual sales increased an additional 1,200,000 gallons. (RT 767; Exs. 82, 83)

3. By the middle 1970s, 85-90% of the gasoline business of John Dompier Oil Company consisted of the sale of gasoline at retail. (RT 757)

4. During the early 1970s, Texaco encouraged Dompier and other distributors to develop its own retail outlets. (RT 1465, 2055-2058)

5. Texaco's Spokane representatives encouraged Dompier to purchase stations even if he had to pay more than their actual value to obtain them. (RT 755-778, 848-849)

6. At the same time Dompier's gasoline volume was increasing, Texaco management was criticizing the Portland Region's

decrease in "throughput volume" (gasoline volume at stations like the Plaintiffs). (Exs. 33, 127, 374, 128, 39; RT 2066-2067)

7. At the same time Dompier was being encouraged to enter the retail market, Texaco encouraged Plaintiffs to stress service to the public at their stations. (RT 1454-1460, 1634-1636; Exs. 123, 37, 39, 911)

8. Texaco's local management was aware that Dompier began to concentrate its sales in high volume outlets. (Ex. 215; RT 1460-1469)

9. By 1978 the gasoline sales by the John Dompier Oil Company had increased 270% from the figures of 1970. (Ex. 215)

10. Under its "Fill the Gap" program Texaco "encouraged and motivated [distributors] . . . to select and develop prime sites, thereby improving retail represen-

tation . . . ." (Ex. 11, p.1) Texaco's wholesale Manager set an objective of three new distributor stations for the Spokane District under this program. (Exs. 12, 23; RT 158, 1446-1453)

11. Mr. Fisher, Texaco's Vice President, testified that the shift in sales from Texaco's retail class of trade to distributor class of trade was caused almost entirely by the magnitude of the distributor discount. (RT 1413-1416)

12. Texaco's management received complaints concerning the retail pricing of the stations supplied by John Dompier Oil Company and Texaco representatives acknowledged that the John Dompier Oil Company was passing through a portion of its wholesale discount to the stations which it supplied. (RT 2903-2906, 1632-1633, 403, 1555, 734-735)

13. Mr. Andy Evans, Texaco's sales representative in Spokane, testified that the principal competition faced by the Plaintiffs was that of the Dompier-supplied stations. He also testified that the Plaintiffs could not profitably operate as low price, self-service stations while paying the RTW price. (RT 2907-2908, 1626, 1636-1637)

14. According to Texaco's representative in charge of the Dompier account, Mr. Robert Vogelman, the distributor margin of .0365¢ per gallon under the retail tankwagon price "would categorically allow our Distributor [John Dompier Oil Company] a retail marketing advantage over our present contract retailer and investment retailers with which they cannot compete." (Ex. 215)

15. There was testimony from Plaintiffs of complaints that they had from customers

concerning their pricing and the pricing at the stations operated and supplied by the John Dompier Oil Company. (RT 530-531, 238, 243, 315, 401, 530, 600-601, 657-658, 1558, 1290, 732-733)

16. The Plaintiffs testified that they saw customers of theirs in gasoline stations operated and supplied by the John Dompier Oil Company and Gull, and found credit card receipts from other stations in cars they were servicing. (RT 249, 316, 1558, 1244-1245)

17. Mr. Harper, one of Texaco's expert witnesses, testified about reasons why a Dompier station could sell 70,000 gallons per month while a Plaintiff's station on the same street a short distance away sold only 20,000 gallons. He admitted that other than their different buying prices, there were no differences between the two stations except that the Dompier station

had a canopy and the Plaintiff may have occasionally had dirty hands from doing service work. (RT 2278-2315, Exs. 920, 921,922A, B and C)

II. EVIDENCE OF COMPETITION FOR RETAIL SALES.

1. Prior to 1973, Texaco created price zones to show stations which competed directly with each other, and on the basis of which price changes to meet competitive situations were made. (Exs. 27 and 794; RT 1436-1442) Several Plaintiffs' stations were located in or adjacent to price zones which included stations supplied by or operated by the John Dompier Oil Company and the Gull Oil Company. (Exs. 27, 794; RT 798, 805-806, 1436-1442)

2. Mr. Victor, Vice President of Gull, testified that Texaco's price zones were smaller than those used by Gull because

Gull believed that its competitive area was larger than the area defined by Texaco price zones. (RT 703) Mr. Victor said that the market for gasoline in Spokane was the metropolitan area because people were able to drive around the area easily. (RT 703-704, 709)

3. Andy Evans, Texaco's sales representative in Spokane, testified that the price zones were too small and did not include all of the competition experienced by Texaco outlets. He recommended that the size of some price zones in Spokane be increased because they did not reflect the actual competition between stations. (RT 1642-1643)

4. Several of Texaco's price zones in Spokane included stations which were seven to twelve miles apart because these stations competed with each other. The price zone west of Spokane which included

Mr. Cliff Robinson's station, 8 miles from the downtown Spokane area, merged with the traffic pattern in the downtown price zone. (RT 804-806, 1436-1442; Exs. 27, 794)

5. Texaco's Vice President testified that there was considerable "intrabrand competition" within the Texaco brand. (Ex. 1)

6. Numerous customers testified to the competition between Plaintiffs and Dompier stations. (<u>See</u> Section IV(B), <u>infra</u>.)

III. EVIDENCE OF TIGHT PROFIT MARGINS AND STRONG COMPETITION.

1. Neil Dompier testified that any retailer who could not keep his retail price down with him was not considered a competitor by him. To be a competitor of his, a dealer needed a low enough buying price to meet his price and made a profit.

(RT 838-839) In 1975, if Dompier posted a retail price equal to Plaintiffs' purchase price from Texaco (RTW), he would make approximately .04¢ per gallon. (RT 796, 810)

2. Mr. Victor of Gull Oil testified that if he could not keep his price within .01¢ of the majors, he would lose a substantial volume of his business. (RT 704-705)

3. Mr. Victor testified that a 1¢ price difference at retail would cause a substantial loss of business in the gasoline market during the relevant time period. (RT 703-704)

4. Mr. Victor testified that Dompier was an aggressive marketer in the Spokane area. By aggressive marketer he meant that the stations tried to price below their competition in the immediate surrounding area and were generally

pricing below the prevailing major price in the area where they competed. Gull considered every station in Spokane to be part of its competition. (RT 704-709)

5. The retail gasoline market in Spokane was characterized by strong competition and low profit margins. (RT 799, 810, 1114-1116, 1124-1125, 704-705, 708-709; Exs. 215, 202) Except in the most unusual circumstances, a station's retail gasoline price was the most important factor to its success. (RT 1114-1116, 705, 837, 838, 1391-1395) Gasoline prices also affected other aspects of a retail dealer's business. For example, Texaco's dealer training manual stated that the amount of a station's sales of tires, batteries, accessories and "backroom" repair work depends upon the amount of gasoline it sells. (Ex. 201 at 8-1, 8-2; RT 1500-1502)

6. Mr. Dompier testified that because the Plaintiffs purchased their gasoline for more than Mr. Dompier from Texaco, Plaintiffs would not be able to maintain a retail price competitive with his retail price. (RT 837-848)

IV. TEXACO'S KNOWLEDGE OF DIRECT LOST SALES CAUSED BY THE PRICE DISCRIMINATION

1. Texaco's Long-Range Plan, prepared by Vice President William Fisher, stated that the competition from wholesaler-supplied and -operated stations was causing a loss of sales by the independent retailer class of trade. (Ex. 202) Both Dompier and Gull were considered Texaco wholesalers.

2. Texaco observed that the practice by Texaco distributors of passing on to their customers the discount granted by Texaco was creating severe problems for Texaco's lessee dealers who also were paying a

gallonage rental to Texaco in addition to retail tankwagon. (Ex. 202)

3. Texaco's Senior Vice President, Mr. William Kinnear, said that distributors were obtaining business from Texaco's independent retailers and that the increase in sales by the distributors could be traced almost entirely to the magnitude of the distributor discount and the abuse of the hauling allowance. (Ex. 1; RT 2072-2073)

4. Texaco's regional managers were of the opinion in 1976 that there was a "rampant and alarming increase in distributor gasoline volume" and a "sales imbalance . . . developing among various classes of trade." (Ex. 2)

5. Mr. Fisher, Texaco's Vice President in charge of pricing, testified that he believed that the "root cause" of the ram-

pant and alarming increase in distributors' gasoline volume was the distributor price. (RT 1415-1416)

6. Texaco's Long Range Plan (Ex. 202), prepared by the Vice President in charge of pricing, William Fisher, observed that retail pricing practices of its wholesalers (i.e., Dompier and Gull) was causing direct-supplied retailers problems in staying competitive.

V. TESTIMONY OF THIRD PARTY WITNESSES (CUSTOMERS) RE DIVERTED SHARES

Numerous customers of the Plaintiffs in the Spokane market testified that they changed their buying practices from Plaintiffs' stations to stations operated and supplied by the John Dompier Oil Company because of the difference in price charged for Texaco gasoline at the pump. The evidence was that the difference in the retail price was generally between .02¢

and .05¢ per gallon. Customers of the Plaintiffs testified that their driving routes took them virtually all over the Spokane market and in many instances they would pass more than one favored purchaser's station and observe the lower prices at more than one favored purchaser's station.

(a) Leo Green (customer of Plaintiff Vince Lies). During the 1970s, Mr. Green was in the produce business operating a fleet of eight vehicles delivering produce throughout Spokane. Mr. Green initially utilized Mr. Lies for his gasoline sales for the business, spending approximately $1,000.00 per month for his gasoline and service requirements. (RT 470-474, 481-482) In the mid-1970s, Mr. Green discussed with Mr. Lies the difference in the retail price between Lies' station and the Dompier-supplied and operated Texaco

stations in Spokane. (RT 477-479) Mr. Lies told Green that he was operating on a .02¢ margin on his gasoline. (RT 478) The difference between Lies' retail price and the price at the Dompier Monroe Street station was .03¢ to .05¢. (RT 479) He did not have to pump his own gas at the Dompier Monroe Street station. (RT 480) He began to purchase more gasoline at the Dompier Monroe Street station than from Vince Lies because of the price difference.

(b) <u>Ron Hardin (customer of Plaintiff Hank Rigg)</u>. During the 1970s, Mr. Hardin traveled generally eight to nine miles per day to work traveling from the north side of Spokane to the south side. (RT 633) Mr. Hardin initially purchased his gasoline from Hank Rigg. (RT 634) Approximately 90 percent of his gasoline purchases were made utilizing the Texaco

credit card. (RT 635) During the damage period, Mr. Hardin noticed that the retail prices at the Dompier Monroe Street, Freya Street and Third Avenue stations were .03¢ to .04¢ less than the prices at Hank Rigg's station. (RT 647-648) The Dompier Texaco stations were on the same traffic pattern that Mr. Hardin utilized to commute to and from work. (RT 637) He drove by the North Monroe Dompier station daily to and from work. (RT 638) He did not trade with the independents because he used his Texaco credit card most of the time. (RT 638-639) He did not have to pump his own gas at the Dompier Monroe or Third Avenue stations and still received the lower retail price. (RT 637-638) After he noticed the difference in the price between Rigg's station and the other Dompier stations in the market, he began to trade with the Dompier stations 75% of the time (RT 637) due to a .03¢ to .04¢

savings per gallon at the pump. (RT 639-40) Mr. Hardin discussed the retail price at the other Dompier stations with Mr. Rigg. (RT 640)

(c) Lt. Gene McGougan (customer of Plaintiff Jim Sills). As a Spokane City police officer, Lt. McGougan traveled most traffic routes in the Spokane area in the early 1970s. (RT 1534-1535) Lt. McGougan lived on the north side of Spokane and initially purchased most of his gasoline from Texaco, utilizing his Texaco credit card 98-100% of the time. (RT 1535-1536) In the early 1970s his family utilized three cars (RT 1537) and traded with Mr. Sills. He began to trade with the Dompier North Monroe station after he noticed a difference in the retail price between Sills and Dompier (RT 1537-1538), and by 1976 he was trading with the Dompier North Monroe station 80-90% of the time. (RT 1539)

(d) Mike James (customer of Plaintiff Al Allen). Mr. James was the former son-in-law of Al Allen, and worked at Mr. Allen's station for 11 months in 1974. (RT 1585) He traded with Mr. Allen while he was employed there. (RT 1586) After leaving Mr. Allen, he was a manager of Midas Muffler in Spokane and commuted between his home and two different Midas stores in Spokane. (RT 1586) He observed that the difference in the retail price between Mr. Allen and the two Dompier stations on Monroe and Market Streets was .05¢ (RT 1587-1588), and he began to trade at the Dompier North Market and Monroe Street Texaco stations. (RT 1586-1589) When he purchased product from Mr. Allen, it was at his self-service island (RT 1587), and when he purchased product from Dompier, it was attendant served. (RT 1589)
Mr. James was purchasing one to two gas fill-ups per week. (RT 1592) He did not

generally trade with independent-branded stations (RT 1588), due to his brand loyalty to Texaco.

(e) Robert Town (customer of Plaintiff Alva Blue). Mr. Town was a retired employee from Crystal Linen Supply Company in Spokane. (RT 1594) Mr. Town initially traded with Mr. Blue for his gasoline needs, purchasing ten to twelve gallons of gas per week. His home was located in the neighborhood near Mr. Blue's station, but he began to go out of his way to buy Texaco gasoline at the North Monroe station which was 20 blocks from his home because of the difference in price. (RT 1595-1596) He observed that the difference in the retail price between Mr. Blue and the Dompier North Monroe station was .03¢ and .04¢ during the 1970s. He began to trade with the Dompier North Monroe station as a consequence of

the difference in the retail price and quit dealing with Mr. Blue. (RT 1596-1597)

(f) Ernie Rouse (customer of Plaintiff Hank Rigg). During the 1970s, Mr. Rouse was the owner of the Spokane Cash Register Company located on North Monroe. He operated a fleet of six to eight vehicles during 1972 to 1981 for delivery purposes and purchased gasoline from Mr. Hank Rigg, also located on North Monroe. (RT 1600-1601) He utilized a Texaco credit card. (RT 1602) He estimated that two to three vehicles would purchase full tanks of gasoline every day. (RT 1602) While he was trading with Mr. Rigg, he began to observe a difference in the retail price at Rigg's station versus Dompier's North Monroe Street station. (RT 1602-1603) He observed the difference in the retail price was approximately

.04¢. The difference in the retail price caused him to quit doing business with Hank Rigg and to begin buying gasoline at the Dompier North Monroe station. (RT 1603-1605) After he left Mr. Rigg for his gasoline business, he was embarrassed to deal with him only for service work on his vehicles so he began to utilize other dealers for service work as well. (RT 1605) He encouraged his drivers to look for low retail prices. (RT 1609)

(g) <u>John Moritz (customer of Plaintiff John Bevan)</u>. Mr. Moritz was a pharmaceutical salesman for Burroughs Pharmaceutical during the 1970s. From 1964 up until the early 1970s, he primarily purchased gas from John Bevan's Texaco station on North Wall and his station on Third and Lincoln. (RT 1154) He began to purchase his product from the Dompier East Third station because of the lower retail

price. (RT 1155) He observed a .03¢ to .04¢ difference in the retail price between Bevan and Dompier. (RT 1156) He received pressure from Burroughs to buy at the lower retail price. (RT 1155) Moritz had developed Texaco brand loyalty and did not purchase from independent non-branded stations. (RT 1156) Approximately 90% of his business ended up with the Monroe Street or Third Avenue stations. (RT 1157)

(h) <u>Eva Walch (customer of Plaintiff Gene Robinson)</u>. Mrs. Walch lived in the Hillyard section of Spokane (RT 1169) and worked at a downtown department store, The Bon Marche. (RT 1170) In the early 1970s, she purchased approximately 90% of her gasoline from Mr. Robinson on North Market. (RT 1171) After that, she began to buy gas from the Dompier North Market station. (RT 1171) She rarely purchased

her gasoline needs from independent stations. (RT 1171) She observed that the difference in the retail price between Robinson's Texaco station and the Dompier North Market station was .07¢ and .08¢ per gallon. (RT 1172) She stopped trading with Mr. Robinson completely as a consequence. (RT 1172-1173) She received service work from the Dompier North Monroe station as well as gasoline. (RT 1174)

(i) Rod Scroggin (customer of Plaintiff Ralph Webber). Mr. Scroggin was a teacher at Gonzaga Prep High School in Spokane and also operated a dental/biological lab on North Hamilton Street near Ralph Webber's Texaco station. (RT 1328-1329) Mr. Scroggin made deliveries to dentists located throughout Spokane and utilized a Texaco credit card for his business use. (RT 1329) He traded with Mr. Webber almost exclusively until he began to

observe other Texaco stations with lower retail prices than Mr. Webber. (RT 1330-1331) This included the Red Carpet Division Street station, the Dompier Monroe Street station and the Dompier Market Street station. (RT 1330-1331) He observed the difference in the retail price was .03¢ to .04¢ per gallon. During this time period, he was purchasing two tanks per week (20 gallons each). As a consequence of the difference in the retail price, he quit trading with Mr. Webber (RT 1331-1332), and purchased gasoline from Dompier's North Market station, North Monroe station and Mission Avenue station. (RT 1332)

(j) Myrtle Mottaz (customer of Plaintiff Al Allen). Mrs. Mottaz purchased almost all of her gasoline utilizing a Texaco credit card from Mr. Allen on Northwest Boulevard at his self-service island until

she observed a difference in the retail price between Mr. Allen and Dompier's North Monroe Street station. (RT 1344-1345) She observed that the difference in the retail price was between .03¢ to .04¢ per gallon. This caused her to quit buying gasoline from Mr. Allen and begin to trade with the Dompier Monroe Street station. (RT 1345-1346) The gasoline at the North Monroe Street station was attendant-served. (RT 1346) She traveled nine extra blocks in order to trade with the Dompier station. (RT 1347)

(k) Gary Corkins (customer of Plaintiff Al Allen). Mr. Corkins is a mechanic for Johnson Trailer Sales located in the Spokane Valley. He resides in the northwest section of Spokane and commuted 24 miles a day to work. (RT 1352-1353) He initially purchased his gasoline from Mr. Al Allen at the self-service island.

(RT 1354-1355) He began to observe that there was a difference in the retail price between Al Allen's self-service island and the Dompier Monroe Street station. He quit trading with Mr. Allen (RT 1354) and began to trade with the Dompier station on North Monroe where the product was attendant-served because of the retail price difference. (RT 1355) He also purchased gas from Dompier's Freya Street station and the Market Street station. (RT 1360-1361)

APPENDIX B

APPENDIX B

Plaintiff's Exhibit 1

March 5, 1976

Mr. Gorman C. Smith
Assistant Administrator
Office of Regulatory Programs
Federal Energy Administration
2000 M Street, N.W.
Washington, D. C. 20508

Dear Sir

On February 27th, I met with Douglas G. Robinson, Deputy General Counsel, and other FEA representatives to discuss in some detail certain trends which have arisen in our marketing of gasoline over the last several years. Mr. Robinson suggested that I reduce to writing the points we discussed and submit them to you for your information and consideration.

Over the last several years, the volume of gasoline we sell to Texaco distributors has increased at a dramatic

rate, while the volume sold to directly supplied retailers has suffered an equally dramatic decrease. For example, several Texaco distributors showed an increase of over 300% in gasoline purchases in 1975 as compared to 1972. In fact, in just one year, the average increase in the volume purchased by 28 of Texaco's largest distributors was 32% and the average increase for all distributors was over 13%. During the same period, the volume of gasoline sold to independent retailers decreased approximately 10%. This decrease was more than offset by the increase in purchases by distributors. In fact, since 1972, Texaco has experienced a 16% increase in our total adjusted base period volumes for all classes of trade.

These trends create a severe problem for us and Texaco retailers. The economic viability of many thousands of independent

retailers has been severely strained by this decrease in their gasoline sales. Moreover, Texaco is a net purchaser of gasoline and it is becoming uneconomical for us to continue to provide unlimited supplies of gasoline to all our customers.

We believe this problem can be traced to two basic factors: (1) the relative price levels to our various classes of purchasers [which cannot be changed under FEA regulations without severe penalties to our banked costs,] and (2) the practice of many distributors to accept from us a hauling allowance for gasoline which is not in fact delivered to their bulk plant. While these problems may not be unique to Texaco, their impact upon Texaco is especially severe. We market not only directly to independent Texaco retailers, but also to distributors. Unlike some companies, Texaco distributors are not

located in only those geographic areas in which we do not directly supply service stations. Rather, in many areas of the country, especially urban, we sell our branded gasoline both to independent retailers and independent distributors who, in turn, resell to independent retailers. As a result, there is considerable "intra-brand" competition in Texaco gasoline. [It is ironic that current FEA regulations operate to unfairly favor the distributor over the retailer in these situations.]

For many years, we have sold gasoline to distributors at a discount of approximately 3-1/2¢ per gallon from the price charged our independent retailers. This discount was traditionally justified by the many important services distributors performed when they physically "distributed" this gasoline among many

customers, most of whom required small volume deliveries. These traditional functions continue to be performed by most of our distributors operating in rural areas, who serve various farm and other small volume accounts including service stations. Accordingly, their existing margin is appropriate on both a competitive and functional basis. On the other hand urban distributors have significantly changed their methods of operation over the past few years, particularly since the advent of the gasoline shortage several years ago. These distributors are shedding many of their traditional functions and have concentrated their sales in very high volume outlets. This has reduced their per gallon overhead cost to the point where a good portion of the discount is not being utilized to defray their costs of distribution at all.

In addition to this traditional discount, many of these distributors have been obtaining added savings through the manipulation of their hauling allowance. Because our prices to distributors have traditionally been delivered prices, we are obligated to "haul" gasoline to their bulk storage facilities. Some of our large distributors own their own trucks. In those cases, they could obtain a per gallon hauling allowance based upon the ICC rate for the distance between our terminal and their bulk plant. Increasingly, however, distributors are accepting delivery at our terminal and collecting the full hauling allowance but are not taking the gasoline to their storage facility. Rather, they are transporting it only a small fraction of that distance, and delivering it direct to a retail outlet. While the amount of the hauling allowance varies with the distance to the distribu-

tor's bulk plant from our terminal facility, hauling allowances can reach several cents per gallon. This amount can provide a significant marketing advantage to a distributor when he is not, in fact, incurring the cost of hauling the gasoline to his bulk facility.

We believe that the dramatic shift in gasoline sales from the independent retailer classes of purchaser to the independent distributor classes of purchaser can be explained almost entirely by the magnitude of the distributor discount and the hauling allowance. We believe that they are inconsistent with the realities of gasoline marketing today. [The purpose of my discussion with Mr. Robinson was to acquaint him with these problems and to set forth the following options which might be available to help alleviate them.

1. We could increase prices to all classes of trade. Although this would decrease the total volume of our gasoline sales, it would have an adverse economic impact upon many of our independent retailers and rural distributors.

2. We could allocate product to all classes of trade. However, we consider this to be an unattractive alternative because it perpetuates the artificial relationships presently in existence, and might delay the elimination of controls, which we believe to be essential to any permanent solution to this problem.

3. Under our interpretation of current FEA regulations, we are

permitted to selectively increase the prices to certain classes of trade in certain locations in the country to insure a better competitive balance between the various segments of our business. However, this would involve our accepting a significant cost bank penalty.

4. We could change the methods of granting our hauling allowances to distributors so that they would only be paid for the distances that they actually hauled the gasoline.

None of these options involves any desire on our part to be punitive to distributors, nor does it reflect any plan to "phase out" distributors from our marketing system. In fact, as we mentioned to Mr. Robinson, we propose to

offer distributors a multi-year contract which will provide for a continuing relationship with them.

While no definitive solution emerged from our meeting, I believe that both sides reached a better understanding of the considerations faced by the other, and the following avenues for potential solution did emerge:

1. The FEA representatives present indicated that they would give further thought to permitting a one-time decrease of a penny or so in the price charged our retailer classes of purchasers without requiring us to incur a cost-bank penalty.

2. A ruling can be expected within the month on the issue raised by the FEA's Regional Office in

Dallas concerning the propriety of an earlier 0.3¢ change in the discount granted our distributors. If favorable this ruling will at least permit us to make some adjustment in the distributor margin even though a cost bank penalty will be incurred.

3. Changes in the existing regulations to permit selective pricing by class and location without a cost bank penalty and the expeditious handling of a request for an interpretation of how a revision in our hauling allowance procedures might be treated under existing regulations are considered loss feasible alternatives by the FEA.

The meeting concluded with our request that immediate consideration be given to

items 1 and 2 above, so that we would be able to take steps to alleviate as soon as possible this pressing problem which adversely impacts so many of the independent branded retailers which we supply.

If you would like any elaboration of the points discussed above or if you believe a further meeting would assist you in reaching a decision on any of these matters, please let me know.]

Very truly yours,

J. W. Kinnear

JWK:llw
cc Mr. Douglas G. Robinson